IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6675 of 1997

with

SPECIAL CIVIL APPLICATION No 9060 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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DIGVIJAY CEMENT CO. LTD

Versus

CHANDRAVANI J.S.

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Appearance:

1. Special Civil Application No. 6675 of 1997

MR KM PATEL for Petitioner

MR JS YADAV for Respondent No. 1

2. Special Civil ApplicationNo 9060 of 1997

MR JS YADAV for Petitioner

NOTICE SERVED BY DS for Respondent No. 1

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CORAM : MR.JUSTICE R.BALIA.

Date of decision: 22/04/98

ORAL JUDGEMENT

These two petitions arises out of the same award by both the contesting parties in the following circumstances,

From the material placed on record in two petitions and and the documents namely plaint, written statement, order of the trial court on an application for temporary injunction and the memo of appeal in suit filed by Jamnadas Shobhraj Chandwani, an employee (hereinafter referred to as "J") challenging the termination to be illegal and seeking the relief for reinstatement, the scenario emerges like this. J was employed by Shree Digvijay Cement Co. Ltd. (hereinafter called "the Company") as trainee supervisor with effect from 1st September, 1970 by order dated 1st September, 1970 after holding interview. One of the conditions of the employement was that the services were liable to be terminated by giving thirty days' notice on either side after confirmation. During the probation period, it could be terminated without any notice. J was confirmed by order dated 1st November, 1972. He was thereafter promoted to the post of Assistant Development Engineer by the Company on 13th July, 1975. Thereafter, it appears that the Company was not satisfied with the performance of J and by it's order dated 28th January, 1983, services of J were terminated with effect from 1st February, 1983. However, one months' salary in lieu of the notice was given. In the order, it was specifically mentioned that "you have been employed in supervisory capacity right from the beginning and were discharging supervisory functions." Vide letter dated 30th March, 1983, employee-J took up the stand that his service conditions are governed by the Model Standing Orders applicable to the Company as also the provisions of the Industrial Disputes Act are applicable. He also raised the contention in his notice that the notice is illegal as it was not in consonance with the provisions of the Industrial Disputes Act. This was apart from contesting allegations about his unsatisfactory working. The company replied it by its letter dated 6th April, 1983 taking the stand that since the date of joining, J was appointed as trainee supervisor and not as a workman and, therefore, the Standing Orders did not apply to him either at the time of his joining or when he has been relieved from the services of the Company; that his services have been terminated strictly in accordance with the terms of employment.

In the first instance, employee filed the civil

suit no. 71 of 1983 in the Court of the Civil Judge,(S.D.), Narol challenging the termination order. The termination order was challenged primarily on the ground that it was passed without following the principles of natural justice as no inquiry was conducted against the charges levelled against him and the show cause notice was not given and that the President of the Company is not competent authority to terminate the services of the plaintiff. The resolution of the Board regarding termination of service was the necessary precondition and that the defendants have not followed the rules and regulations in terminating the plaintiff's services. In the pleadings of the plaint, no averment to the effect as to whether the plaintiff was the supervisor or the workman has been raised nor any reference to termination being contrary to the provisions of the Industrial Disputes Act was been made. In the written statement, the Company denied the averments made in the plaint. In the written statement filed by the defendant company also, no reference to any provisions of the Industrial Disputes Act was made. In the additional plea raised in the written statement, no objection as to the maintainability of the suit on the ground of availability of remedy under the Industrial Disputes Act has been raised by the defendant Company. It appears that in the affidavit filed alongwith the application for temporary injunction, the defendant had tried to project that the company was controlled by the Government and was the instrumentality of the State. On these premises, though the trial Court granted ad-interim order, but by order dated 8th February, 1983, rejected application for temporary injunction on the ground that the plea of the plaintiff that the defendant Company is controlled by the Government is misrepresentation of facts and the plaintiff's case is not falling in the category of public employment. He was not entitled to the injunction in view of the specific provisions under the Specific Relief Act prohibiting injunction for specific performance of the contract of service. J appealed before the Assistant Judge vide Miscellaneous Appeal No. 18 of 1983 In Memo of appeal also, no plea as to the termination being illegal being in breach of the provisions of the Industrial Disputes Act has been raised. However, it appears that during the course of hearing of appeal before the Assistant Judge, the plaintiff-appellant-J relied upon the provisions of section 25F of the Industrial Disputes Act to urge that the requirement of Sec. 25F(b) has not been fulfilled regarding payment of compensation for the completed period of service before termination was effective and, therefore, termination by way of retrenchment was illegal. It is in response to

this plea, the defendant Co. said that the termination order is not illegal since it gave one months' notice and asked the plaintiff to clear accounts. Regarding order being punitive, it was said that the same is not punitive and referring to the plaintiff's service condition, it was urged by the defendant that the plaintif was not entitled to any relief. Thus, in substance, J had raised two fold contention in his appeal. Firstly that no inquiry to sustain the termination. Secondly, that no compensation was paid as per the provisions of the Industrial Disputes Act and, therefore, the termination was bad in law because of the breach of section 25F. This amounted seeking enforcement of right arising from the provisions of Industrial Disputes Act, 1947 and the remedies lay as provided under the Act by raising industrial dispute and not by civil suit. The appellate Court came to the conclusion that from the contention raised by the plaintiff, it fall in the realm relating to validity of the retrenchment and, therefore, Civil Suit is not maintainable. He rejected the application for temporary injunction vide order dated 22nd February, 1983. It is informed by the learned counsel for J that since then, the suit has been dismissed and the matter has come to an end.

However, after being unsuccessful in the civil court in obtaining the temporary injunction, J raised industrial dispute and the dispute was referred to the labour court, Ahmedabad which was registered as reference LCA No. 107 of 1984. Before the labour court, the Company raised defence that J was working in the supervisory capacity and the salary of the employee being more than Rs. 1000/at the time of termination, he is not falling within the definition of "workman" as defined under Sec. 2(s) of the Industrial Disputes Act and, therefore, provisions of the said Act would not apply to J.

The labour court found as a fact that J was engaged in supervisory capacity drawing salary beyond the limit specified in the definition of the workman under section 2(s) of the Act and, therefore, reference is liable to be rejected. However, it was of the opinion that because of the malafide contention raised by the company before the civil court, for denying the relief to the plaintiff from that forum which has led the employee to invoke the jurisdiction of the labour court resulting in destroying his remedy in the process.The Labour Court which rejected the reference,it awarded compensation of Rs. 75000/- to the employee against the company.

Feeling aggrieved with the award of compensation, the company has filed special civil application no. 6675 of 1997. After the rule was issued and the operation of the award of compensation in favour of J was stayed by this Court, J filed special civil application no. 9060 of 1997 challenging the finding of the labour court that he was working in supervisory capacity and was not a workman within the definition of the workman under sec.2(s) of the Industrial Disputes Act.

Firstly, coming to special civil application No. 6675 of 1997 filed by the Company, it has been urged by the learned Counsel for the petitioner Co. that the Tribunal having come to the conclusion that the employee was not the workman within the meaning of section 2(s) the labour court had no jurisdiction to award the compensation which was not related to the termination order. Moreover,the assumption that the Company has misled the employee as well as the Civil Court for denying the relief to the employee against the alleged illegal termination is apparently erroneous. If the appellate order passed in the civil proceedings is read, at no point of time, the Company has given any suggestion or inclination that the employee is the workman amenable to the provisions of the Industrial Disputes Act. On the contrary, in its letter of termination and in reply to the the objections to the termination raised by the employee, it has been made clear that he has been employed from the beginning until the date of service in supervisory capacity and he is not falling within the definition of workman and neither the Model Standing Orders nor any provisions of the Industrial Disputes Act, 1947 applies to him. That is the plea which has been consistently taken by the Company before the labour court as well. In the Civil Court also, it was not the plea of the Company that J is covered under the Industrial Disputes Act. It was only in response to J's plea, that he is a workman and that he is protected under the Industrial Disputes Act, that the Company had urged that if that be so, remedy of the J would be under the Industrial Disputes Act and not by filing the civil suit. As the right claimed against illegal retrenchment flows from the provisions of the Industrial Disputes Act, person must be confined to remedies provided under the provisions of the Industrial Disputes Act.

On the contrary, it has been contended by the learned counsel for the J that this is the finding reached by the labour Court on the basis of record and finding of fact cannot be interfered in a petition under Article 226 and/or 227 of the Constitution. It was also

urged by the learned Counsel for the respondent employee that it was the plea of the company or rather it was the statement of the Company that the provisions of the Industrial Disputes Act applies to the employee and, therefore, he has suffered adverse order in civil court proceedings and was driven to have recourse to the remedies under the Industrial Disputes Act, 1947.

Having carefully considered the rival contentions, I am of the opinion that that from the narration of facts, it is apparent that at no point of time, the Company has been responsible in driving the employee to have recourse to the provisions of the Industrial Disputes Act or seeking reliefs thereunder. As noticed above, in the order of termination itself, it has been mentioned that he has been J throughout as supervisor and his services are being terminated in accordance with the terms of employment by giving him one month's salary in lieu of notice. When the employee objected to such termination, with reference to the provisions of the Standing Orders and the ID Act, which has apparently been sent after J has filed civil suit and obtained ex-parte ad-interim order, on the ground that the notice of termination was illegal because it was not as per the provisions of the Industrial Disputes Act in reply to the said objections, the Company stated that J is not the workman but is a supervisor since the date of joining until the termination of employment and that the Model Standing Order and the ID Act does not apply to him. The plea does not appear to have been raised before the trial Court in as much as the trial court has refused the injunction only on the ground that it being not a case of public employment, J is not entitled to the relief of specific performance of contract of service. The argument appears to have been raised for the first time during the course of hearing before the appellate court. The appellate order referred to above in no uncertain terms states that the plaintiff raised the issue that the termination which is challenged in the suit is violative of the provisions of the Industrial Disputes Act particularly with reference to section 25F (b) of the I.D. Act and in response to this plea as to maintainability of the suit for raising this dispute was raised by the Company.

It may be noticed that even without raising any objection, the law is well settled by the decision of the Supreme Court in the matter of Premier Automobile Ltd. v. Kamlakar Shantaram Wadke and others (AIR 1975 SC 2238) that if the right which is sought to be enforced is a right created under the Act such as Chapter VA then the

remedy for its enforcement is either Section 33C or the raising of an industrial dispute, as the case may be. The Civil Court was bound to take notice of this pronouncement of the Supreme Court and held against the plaintiff as to the maintainability of the suit for challenging the termination. being violative of any provisions of Chapter VA of the I.D.Act. It cannot be said that the defendant company had any time given out that J was a workman and governed by ID Act or Model Standing Orders. However, it is for the suitor to find proper forum on the basis of right which he is seeking to enforce. If he inspite of being told about his status which the Company thinks, he insists to consider his status otherwise and pursue his remedies on that basis, blame cannot be placed at the doors of the Company to hold that the Company has misled J to abandon his rightful remedies and diverted him to remedy which was not available under law. On the basis of the material, it is not possible to reach the conclusion that the petitioner company was in any manner responsible for misleading the employee to abandon one of his remedy and pursue another remedy, very premise on the basis of which the compensation is awarded to the employee-J does not survive. Te order cannot be sustained.

It may be noticed here that if the employee is held to be working in the supervisory capacity drawing salary beyond the limit prescribed at the relevant time under section 2(s) proviso-4, remedy of the employee against the termination and the breach of the contract simplicitor would be in civil court only and not elsewhere and there too unless the employment falls in the category of public employment protected by some statutory provisions, he is not entitled to claim specific performance of contract for service by claiming reinstatement nor he can claim damages without proving as a fact the alleged breach of contract on the part of the employer and damages caused to him directly by such breach. In that view of the matter, even otherwise, once the Tribunal has found that the reference was not maintainable and it has reached the conclusion that the termination was in breach of contract, solely on the ground that the civil court has passed the order on the arguments raised before by J himself which resulted in loss of remedies it cannot confer jurisdiction on the Labour Court to grant compensation for loss of employment.

If at all driving the employee to invoke the jurisdiction of the labour court could be attributed to mala fide on the part of the employer, the best the

labour court could have done is to saddle such erring party with exemplary or compensatory cost but it could not have related anything to the loss of employment legality of which is not gone into nor it had jurisdiction to go into on its own finding. The order of the grant of compensation by the court, in my opinion, thus suffers from the errors apparent on the face of the record and cannot be sustained.

However, before proceeding further the petition filed by J may be considered. It has been urged by learned counsel for J that the finding of the labour court that J was not the workman but employed in supervisory capacity not falling within the definition of workman under the provisions of section 2(s) Proviso-4 is erroneous, and liable to be distrubed in exercise of jurisdiction under Article 226. Firstly in the petition this finding has not at all be challenged. If one has to look at the grounds riased in this petition, entire petition is couched to see setting aside of the termination order on the ground that termination was in breach of principle of natural justice and for reinstatement and also direction to the respondents to comply with the award of the labour court for paying the compensation of Rs. 75,000/-. So far as grounds raised in the petition is concerned, the learned counsel for J has not made submission in that light and in my opinion rightly when the suit for specific performance of agreement of service is not maintainable under the provisions of the Specific Relief Act itself, petition under Article 226 of the Constitution of India in the realm of private employment between two private parties for that relief is not maintainable. Further, as discussed earlier, mandamus for complying with the award for payment of compensation of Rs. 75,000/- cannot be issued in favour of the employee-J as I have come to the conclusion that the award to the extent is not sustainable.

Even otherwise on merit of contentions, the Tribunal has referred to the statement of an employee-J himself wherein he has admitted that by order dated 15th January, 1973, he has been confirmed as supervisor. He was promoted in the shift machine plant as supervisor. About 20 employees working under each shift in the shift machine plant and he was supervising the work of all the workmen in all the three shifts. He was supervising the work of the employees working under him. He was distributing the work amongst them. He was responsible for maintaining the quality of production under him and he was also responsible to provide the guidelines to

these workmen under him who would not work satisfactorily. On these premises, the labour Court has reached the conclusion that J does not fall in the category of workman on the date of his termination because he was employed in the supervisory capacity and his wages were more than Rs. 500/- prescribed limit at the relevant time to keep the supervisor within the ambit of workman. This finding of the labour court does not suffer from any error which can be corrected in exercise of extraordinary jurisdiction while considering the issue of a writ of certiorari.

Accordingly, Special Civil Application NO. 6675 of 1997 filed by the employer-Company is allowed. Award of the Labour Court dated 12th May, 1997 to the extent it awardsa sum of Rs.75000/- by way of compensation to the employee-J is quashed and set aside with no order as to costs. Rule is made absolute accordingly.

Special Civil Application NO. 9060 of 1997 filed by the employee-J is dismissed. Rule is discharged. There shall be no order as to costs.

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Vyas